TESTIMONY OF MICHAEL HOROWITZ
BEFORE THE HOUSE JUDICIARY SUCOMMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
May 19, 2015

Chairman Marino, Vice Chairman Farenthold, Ranking Member Johnson and Members of the Subcommittee:

Thank you for inviting me to testify this afternoon at a hearing I believe to be of great and special importance.

As most of what I wish to say about the role of lawyers in a democracy, and the role played by lawyers in the Reagan administration, is set forth in the attached essay I recently wrote for National Review Online, my written statement will be brief.

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It has been my great fortune to have participated in two of the great and formative American experiences of the 20th century: the fight against racial segregation and the fights for market freedom and against Communist rule conducted during the Reagan administration. In the former instance, I was a Professor at the University of Mississippi Law School during the first years it became racially integrated; in the latter instance, I was OMB General Counsel during the first Reagan term.

What ties the experiences together is what they taught about the crucial need for governing policies in a democracy to be based on an abiding respect for the rule of law.

While in Mississippi I saw the destructiveness wrought by public officials who sought to subordinate the clear commands of law to their policy and personal preferences – and saw the historic progress that came when other officials recognized that the well-being of society came from following the law, no matter the seeming cost of doing so.

While serving as a senior lawyer in the Reagan administration, I and my fellow attorneys often felt badly when our legal opinions blocked our colleagues – and at times the President -- from adopting policies that they (and we) strongly felt

to be badly needed. In doing so however, we recognized – and recognize even more clearly today – that our efforts ensured that the President's reforms were based on principle rather than raw power or expediency, and thus helped gain for them the respect and lasting effect they have enjoyed.

People regularly said of President Reagan that they respected him and what he did even though they often disagreed with his views, and I believe it clear that his respect for the rule of law was essential to the respect he enjoyed from the American people.

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For this reason, and as the attached essay makes clear, I believe it urgent for Congress to take action against the administration's repeated failures to comply with the clear terms governing statutes and with other requirements of law.

I and others who served in senior legal positions in the Reagan administration:

- have watched with incredulity as traditional Executive Branch enforcement discretion has been converted by the administration into a claimed right to effectively repeal integrated sets of governing statutes;
- know that no political or policy claim should have allowed the administration to distribute billions of dollars in Federal subsidies to two classes of beneficiaries under a statute that expressly restricted the subsidies to but one of the classes;
- are deeply troubled to hear of the use of back-door means of negating Congress' constitutional power of the purse by sweetheart case settlements that mandate the funding of agencies, programs and groups;
- find it hard to imagine – as did a unanimous Supreme Court – that in clear derogation of the Senate's constitutional confirmation authority, recess appointments were made by the administration during Congressional sessions;
- find unworthy of his office the President's blithe "we've expanded my authorities" and "I've got my pen" claims that send the clear message that his policy discretion is subject to restraint only by politics or court rulings made after years of extended litigation. (Of note, the latter

conduct was a common part of "massive resistance" tactics that sought to extend racial segregation as long as possible.)

- find equally unworthy administration efforts to convert the legally dubious dependencies and expectations it has created for millions of Americans into political pressure on the courts to rule in its favor.

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Just as the South's resistance to racial justice led to permanent limitations on various forms of state action, the administration's conduct has made it sadly proper for Congress to now consider ways of limiting Presidential authority in order to ensure that meaningful legal reviews accompany major White House and agency conduct. While Congress will be greatly challenged to do so in ways that serve the public interest, the administration's conduct poses a challenge to rule of law governance that must be met.

Here are some options that the administration's conduct has brought into play:

- Insisting that Congress be provided with greater and more rapid access to Executive Branch legal memoranda that authorize major policy actions;
- Scheduling regular Judiciary Committee oversight hearings at which agency General Counsels and senior Justice Department officials are required to identify and openly defend their major statutory constructions;
- Creating "action freeze" procedures that bar Executive Branch statutory constructions from being put into effect pending further Congressional review – a process worth carefully examining where such constructions lead to significant public or private expenditures;
- Creating limitations on the effect of Executive Orders – a major concern in light of the fact that the current size and reach of the Federal government gives orders that "merely" govern agency conduct the same effect to govern private conduct as do general purpose statutes;
- Modifying the presumptions of legality that now attach to agency constructions of statutes;
- Modifying standing doctrines that limit judicial challenges to Executive Branch action;

- More carefully considering the wisdom and character of legislative authorizations of Executive Branch waiver authority, and in some cases enacting laws with explicitly defined limitations on management flexibility in the administration of laws.

To be sure, many of the above options could transfer excessive decision-making power to the courts, and others could further rigidify and bureaucratize government decision-making. That said however, the need to end the administration's practice of reading statutes in whatever manner serves its policy preferences and the need to ensure that future administrations will not do the same, is an overriding priority now before this Committee and Congress.

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A final word, addressed to the Minority Members of this subcommittee. I have lived and practiced law in Washington for many years and understand the political need to support the administrations of one's party, especially when its actions result in policies that one supports. In the face of that reality, however, I urge restraint in the defense of the administration's conduct as you consider the means versus ends questions that are at the heart of today's hearing. Defense of sweeping Executive Orders that repeal disfavored statutory systems is an inescapable defense of greatly increased Executive Branch powers at the expense of those given to Congress. And Executive Orders that with the stroke of a pen bring about sweeping changes that one favors invite equally sweeping changes that one will later abhor.

Bipartisan opposition to the administration's stroke of the pen practices is the surest means of resolving the current crisis without the need to make high risk Executive Branch structural changes. I hope that this will be possible.